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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 185

GILBERT REUTER,

Appellant,

vs.

STATE OF WISCONSIN, ex rel.
Department of Agriculture,

Respondent.

BRIEF OF APPELLANT
Opposing Respondent's Motion to Dismiss or Affirm.

Pursuant to Rule 7 (par. 3) of the Rules of this Court, Appellant hereby files his brief in opposition to Respondent's motion to dismiss or affirm.

ISSUES INVOLVED.

There is no issue of fact presented upon this motion. Respondent predicates its motion to dismiss or affirm on

the ground that a substantial federal question is not presented. In our "Statement as to Jurisdiction" pages 10-11), we pointed out that a substantial federal question is presented in this cause, and cited supporting authorities. This brief will be confined to answering the arguments contained in Respondent's Brief against jurisdiction and its motion to dismiss or affirm.

Respondent's counsel digresses from the narrow issues involved in this case by referring to sanitation provisions of the judgment, and to matters outside the record. Appellant does not complain of the sanitation provisions of the judgment, so those are immaterial. Respondent's counsel also discusses the general power of the state to fix prices of commodities. With that general power we are not concerned and we may lay it out of the case at once. The question with which we are concerned on this appeal is the validity of Respondent's administrative order fixing the same price for the milk sold on a credit and delivery basis as on a cash and carry basis.

ARGUMENT.

I.

A state administrative agency may not require a cash and carry milk dealer to charge for a credit and delivery service he does not perform.

We admit that upon *proper occasion* and by *appropriate measures* the state may regulate a business in any of its aspects, including the fixing of prices. That was decided in *Nebbia vs. New York*, 291 U. S. 502, 78 L. Ed. 940, in sustaining the New York Milk Control Law. But the

limitations upon that power were also pointed out in that case (291 U. S., at 525) that in pursuing a price fixing policy, *the state may not act in an arbitrary or discriminatory manner, that the due process clause prohibits a regulatory law which is unreasonable, arbitrary or capricious,* and the means selected for regulation must have a real and substantial relation to the object sought to be attained.

In Milwaukee, the cost differential between credit and delivery sales and cash and carry sales is approximately 4c per quart—that is, it costs about 4c per quart more to sell the same milk on credit and delivery than on the cash and carry plan. The trial court and the State Supreme Court both rejected Appellant's claim that the price-fixing order was invalid for requiring the same price for cash and carry sales as for credit and delivery sales of the same milk. Appellant's answer specifically raised this issue in the trial court (R. 11).

We are informed that in the City of Washington, the identical milk which is sold on a credit and delivery basis at 14c per quart, is sold in cash and carry stores at 9 1/2c per quart.

William Fellows Morgan, Jr., Commissioner of the Department of Markets of New York City, has pointed out that it is the credit and delivery system of selling milk that is detrimental to the public interest, not the cash and carry system. He is reported to have said:

> "I am not particularly interested in the cost of milk to consumers who insist on having it delivered to their homes, as I feel that there is no justification for this type of service any more than there is for eggs to be delivered every morning. Retail milk routes are a luxury service and I am not at all convinced that those who purchase milk in the stores are not paying for a part of this service. Further-

more, this Department is only interested in helping those income groups who are anxious to avail themselves of the savings afforded by purchasing their milk in the stores.

* * * * * * *

"The most wasteful step in getting the milk from the farmer to the grocery store is in the ridiculous system of overlapping deliveries which exists today. This Department has photographs of twelve different independent milk companies serving one individual grocery store between the hours of 6:30 and 8:00 in the morning. Obviously, if that store were to purchase one brand of milk only, the one company could afford to sell the milk for less."

(Quoted in "Pure-Pak News," Devoted to Promoting Health in the Distribution of Pure Milk, Published, Detroit, Michigan, Volume 4, June, 1941).

There is the same wasteful system of overlapping deliveries by numerous dairies delivering a bottle of milk to consumers in the same block. It is for that reason that the cost of delivering milk from the city dairies to the consumer is almost as much as the farmer gets for producing the milk. In Wisconsin, the greatest dairy state in the Union, the farmer gets from 4c to 5c per quart for milk, while in Milwaukee, which is in the heart of the richest dairy section in the nation, it costs about 4c per quart to deliver that milk from the city dairy to the consumer.

In every other business, a lower price for cash and carry sales than for credit and delivery sales for the same commodity has not only been permitted for many years, but has always been approved as necessary, right and just. There is no difference in the milk business warranting different treatment, or warranting the abolition of cash and carry sales.

It should be noted, too, that the statute, and the Respondent's order, purported to have been made thereunder which is enforced by the judgment appealed from, is directed against *consumers* as well as dealers. The statute, in permitting price fixing, provides that the Respondent may fix "schedules of prices for producers, dealers and *consumers* * * *." *Wis. Stats., 1939, Sec. 100.03 (5, a).* Respondent's order enforced by the judgment also provides that "dealers shall charge and *buyers shall pay* * * *" the prices fixed by the Respondent (Complaint, R. 7). Because the judgment appealed from is directed not only against Appellant, but also against hundreds of thousands of consumers living in Milwaukee County, the case is of incalculable public importance.

The object of the Wisconsin Milk Control Law, as the Wisconsin Statute itself provides, *Sec. 100.03 (1) Wis. Stats., 1939, page 1480,* was not to give the credit and delivery dealers a monopoly and prohibit cash and carry sales of milk (obviously, requiring the same price to be charged for cash and carry sales as for credit and delivery sales, prohibits cash and carry sales as effectively as outright prohibition of the cash and carry business); its object was not to prevent consumers buying from cash and carry dealers and thus save the expense of credit and delivery. On the contrary, the statute says its object was to prevent unfair methods of competition and unfair trade practices, *Wis. Stats., 1939, Sec. 100.03 (1), page 1480.* The delegation of power to the Respondent to prescribe prices is only such prices as the Department "shall find necessary to eliminate unfair methods of competition or unfair trade practices," *Wis. Stats., 1939, Sec. 100.03 (5, a) page 1481.* Nowhere does the statute give the Respondent the power

to fix the same price for cash and carry sales as for credit and delivery sales.

We submit that the *due process clause* prohibits a statutory enactment or administrative order which attempts to brand the sale of the same commodity at a lesser price when sold at cash and carry than when sold at credit and delivery, as unfair competition or unfair trade practice. On the contrary when the cost of credit and delivery is eliminated it is obvious that it is unfair to require the cost of credit and delivery to be charged for. It is preposterous and contrary to all notions of honesty and justice to permit an administrative agency to act so arbitrarily and so foolishly to mulct people, particularly the class of consumers who can't afford to pay for credit and delivery service, by prescribing that the cash and carry dealers must charge the same price as credit and delivery dealers. In our opinion, nothing so viciously wrong has ever been attempted against the consuming public. When an administrative agency becomes so arbitrary and tyrannical as to issue such an order, and the state courts give no relief against it, this Court, under the due process clause, should act to protect the people from such tyranny. The courts should not hesitate to declare such an arbitrary and tyrannical order as unconstitutional. There is no precedent in its favor and none should be needed to invalidate what is so obviously unconstitutional. Because the question of the necessity of a price differential between credit and delivery and cash and carry sales is a new one, few cases have passed upon it, but the few cases which have arisen have all held that a minimum price order of an administrative agency, prohibiting a differential in price between credit and delivery and cash and carry sales, or for different types of service, is arbitrary and unconstitutional.

The only authorities dealing with this specific question, which we have been able to find, all hold that it is beyond legislative or administrative power to require the same charge for cash and carry sales as for credit and delivery sales of the same commodity, or to require a charge for a service not performed. Those authorities are cited on page 11 of our "Statement as to Jurisdiction."

On principle, it would seem elementary that such price fixing order, which prohibits a differential between credit and delivery and cash and carry sales is so clearly arbitrary and unreasonable as to be on its face unconstitutional, in violation of due process, equal protection, and the right of freedom of contract guaranteed by the Fourteenth Amendment. Clearly, an order requiring a charge for a service that is neither performed nor received is more than foolish—it is arbitrary, tyrannical and unconstitutional.

The numerous cases cited by Respondent do not touch this question. In none of the cases cited by Respondent was this "cash and carry" question presented. In none was the impropriety of a uniform price order, requiring the same charge for cash and carry sales as for credit and delivery sales, even presented, much less permitted or approved.

Nebbia vs. New York, 291 U. S. 502, 78 L. Ed. 940, is no authority for the claim that the state may fix the same price for credit and delivery sales as for cash and carry sales of the same commodity. On the contrary, the New York law involved in that case specifically provided for at least a 1c differential between delivery sales and store (cash) sales, thus recognizing the lower costs of the stores, which required a lower price to the cash and carry buyer than to the buyer who demanded the luxury of credit and delivery service (291 U. S. at 530).

In *Hegeman Farms Corp. vs. Baldwin*, 293 U. S. 163, 79 L. Ed. 259, an injunction against enforcement of a minimum price order as too low was denied.

In *Borden's Farm Products vs. Baldwin*, 293 U. S. 194, 79 L. Ed. 281, an injunction against the enforcement of price order which fixed a 1c differential between well-advertised milk and unadvertised milk was denied.

In *Mayflower Farms vs. Ten Eyck*, 297 U. S. 266, 80 L. Ed. 675, it was held a denial of equal protection of the laws to deny persons entering the milk business *after* enactment of the milk control statute the benefit of a price differential enjoyed by persons in the milk business *theretofore*.

Milk Control Board vs. Eisenberg Farm Products, 306 U. S. 346, 83 L. Ed. 752, did not involve price fixing, but the question of the power of the federal government to regulate the milk business in interstate commerce.

U. S. vs. Rock Royal Co-op, 307 U. S. 533, 83 L. Ed. 1446, involved price fixing to producers, but there was no question of a proper price differential. In that case, there was a differential in price to various producers.

The other cases cited on page 7 of Respondent's memorandum (*West Coast Hotel Co. vs. Parrish*, 300 U. S. 379, 81 L. Ed. 703; *Mayo vs. Lakeland Highlands Canning Co.*, 309 U. S. 310, 84 L. Ed. 774; *Sunshine Anthracite Coal Co. vs. Adkins*, 310 U. S. 381, 84 L. Ed. 1263; *Opp Cotton Mills vs. Administrators*, 312 U. S. 126; *United States vs. Darby Lumber Co.*, 312 U. S. 100) have no bearing whatever upon the question under consideration raised by Appellant.

In every case, federal and state, which we have been able to find in which minimum price orders were sustained, a differential in price between credit and delivery and cash and carry sales was permitted.

II.

Appellant was not required to exhaust any administrative remedy.

Respondent is wrong in its contention that because Appellant did not exhaust his administrative remedy by an action to review the Respondent's order he is precluded from appealing to this Court.

The State Supreme Court did not hold that Appellant was required to seek administrative review of the Respondent's order by an independent action as a condition of attacking the validity of the order in this action. The rule in Wisconsin is to the contrary. The Wisconsin Supreme Court, only several months before the decision in this case, ruled to the contrary on that very point in *State vs. Neveau*, 237 Wis. 85, 294 N. W. 796, 802-3. The Court there held that a person in Appellant's position was not required to commence an independent action to review an administrative price-fixing order as a condition precedent to challenging the validity of such order when sued by the administrative agency for enforcement, but on the contrary, could assert the invaldity of the order as a defense in the injunctional action brought by the administrative agency to compel compliance with the order. The Court said (294 N. W. 802-3):

> "The defendant did not accept the law, he did not commence this action pursuant to the provisions of the law. When the plaintiff sought to enforce the act by invoking the equity jurisdiction of the cir-

cuit court, the defendant was entitled to put forward any and all defenses which he had, including that of the invalidity of the act. As to that there can be no reasonable doubt."

III.

That the "cash and carry" issue was not expressly referred to in the State Supreme Court's opinion, does not preclude this Court from reviewing the judgment.

That both the trial court and the State Supreme Court denied Appellant his constitutional rights is discussed in Chapter I, *supra*. The constitutional question was properly raised in the trial court and the Supreme Court, as pointed out on page 8 of Appellant's "Statement as to Jurisdiction". By affirming the judgment of the trial court, the State Supreme Court denied Appellant his constitutional rights thus asserted, even though the State Supreme Court did not discuss the subject. Even if the State Court does not expressly determine a constitutional question, that does not deprive this Court of the power to review, but on the contrary, this Court has many times reviewed cases where the State Court failed or neglected to pass upon the federal question raised by Appellant. Those cases are cited on pages 8-9 of Appellant's "Statement as to Jurisdiction."

IV.

The stipulation between Appellant and Respondent (mentioned in Respondent's statement against jurisdiction) does not preclude this appeal nor preclude Appellant from attacking the judgment enforcing Respondent's order.

The purpose of that stipulation was not to waive any question of constitutional law or any other question of law, but simply to abbreviate the bill of exceptions and to limit the appeal to questions of law based upon the record made by the pleadings, findings and judgment. If the stipulation attempted to stipulate *the law*, it would not be binding upon the Court because litigants may not make such stipulations.

Swift & Co. vs. Hocking Valley R. Co., 243 U. S. 281, 61 L. Ed. 722;
Salomon vs. U. S., 7 Cust. A. 5, 8;
60 *C. J.* 50 (Sec. 23).

Litigants cannot, by stipulation, bind courts on questions of law, nor are they permitted by stipulation to prevent courts from deciding questions of law as they should be decided.

We might add that in the briefs in the Wisconsin Supreme Court filed by the former attorney for the Appellant (who died after the State Supreme Court's decision was made in this case, and after which we became attorneys for the Appellant) he disclaimed any intention on his part by that stipulation to waive any question of law in the case. He asserted that the stipulation was made for the purpose of limiting the appeal to questions of law based upon the record made by the pleadings, findings and judg-

ment, but he did not intend to waive attack upon the validity of the judgment or the price-fixing order.

CONCLUSION.

We respectfully submit that this appeal presents a very important and substantial federal question. Respondent's reference to the fact that the statute expires of its own limitation on December 31, 1941, is no ground for denying Appellant and hundreds of thousands of milk consumers in Milwaukee their constitutional rights in the meantime.

Respondent's suggestion that "delay be the only result of this appeal" is the usual cry of the administrative autocrat today, impatient with the citizen who stands up and fights for his constitutional rights. Appellant has not sought to delay justice. On the contrary, he has promptly challenged Respondent's price order whenever it was attempted to be enforced against him, and would gladly have this Court advance the case for argument to avoid any possible delay in this Court. The appeal to this Court was taken as expeditiously as possible. Appellant's motion for rehearing in the State Supreme Court was denied on May 20, 1941, and the appeal was obtained on June 3, 1941. The filing of this brief within the time required by Rule 7, Paragraph 3, has been unavoidably delayed by our time having been taken up with State Court proceedings prosecuted by the Respondent against Appellant, and other milk dealers, which Respondent insisted on pressing, notwithstanding the pendency of this appeal. We asked the Clerk of this Court to extend our time to August 15 for the filing of this brief, and he informed us the brief might be filed, subject to objections that might be made by Respondent's counsel. Respondent's counsel's refusal to extend the time

to August 15, we think, was unreasonable, and if any objection is made by him for the filing of this brief, the same should be overruled. Since the Court has recessed until October, whether we filed our brief on July 31 (the time which the Clerk gave us for the filing of this brief) or August 15, is immaterial and does not harm either side.

Respectfully submitted,

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